Residenmas Development Sdn Bhd v YM Raja Halinuddin bin Raja Halid

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO M-02(NCVC)(W)-2003–10 OF 2022
NANTHA BALAN, MARIANA YAHYA AND CHOO KAH SING JJCA
5 MARCH 2024

Civil Procedure — Parties — Locus standi — Bailout and temporary takeover agreement — Whether bailout and temporary takeover agreement could be construed as an absolute assignment — Whether bailout and temporary take over agreement entitled plaintiff to commence suit against defendant — Whether plaintiff had locus standi

Contract — Agreement — Bailout and temporary takeover agreement — Interpretation of clauses in agreement — Whether bailout and temporary take over agreement between parties purely for purpose of security of investment injected — Whether bailout and temporary take over agreement a profit sharing scheme — Whether High Court erred in deciding bailout and temporary take over agreement amounted to an assignment — Whether bailout and temporary take over agreement fulfilled requirements stipulated under s 4(3)

This was an appeal by the appellant ('defendant') against the decision of the High Court ('Suit 55') in allowing the respondent's ('plaintiff') claim. The defendant was the developer of a project known as *Pembangunan Bercampur di atas* Lot PT805-PT806, Muara Sungai Duyung, Mukim Alai, Daerah Melaka Tengah 1 Melaka ('Melaka project'). The defendant had appointed Pembinaan Suci Kesturi Sdn Bhd ('PSK') as the main contractor for the development of the first phase of the Melaka project ('Phase 1') via a letter of acceptance. In executing its obligations under Phase 1, PSK encountered financial and technical difficulties. To overcome these difficulties, PSK decided to obtain assistance from the plaintiff. In consideration of the plaintiff's assistance, PSK: (a) assigned the income and payments/proceeds that PSK was entitled to receive under the contract to the plaintiff ('the said assignment'); and (b) empowered the plaintiff and his nominees with authority, custody and management control of PSK. At all material times, the defendant was aware of the said assignment resulting in the 'take over' of PSK by the plaintiff and his nominees through the dealings between the parties as well as correspondence signed by the plaintiff for and on behalf of PSK in the course of constructing Phase 1 of the Melaka project. Phase 1 was successfully completed and a certificate of practical completion ('CPC') certifying the due completion of Phase 1 to the value of RM28,963,235 was issued by the appointed architect

for the Melaka project. Around the time of the CPC, the previous directors and shareholders of PSK wrested control of PSK from the plaintiff which led to the filing of an Originating Summons No 24NCvC-856–04 of 2012 ('KLHC OS') against PSK, its directors and shareholders and the defendant. In the KLHC OS, both the plaintiff and the defendant had exchanged affidavits, after which a consent order was recorded and the KLHC OS against the defendant was withdrawn. The defendant's financier for the Melaka project was Malaysia Building Society Berhad ('MBSB'). After the issuance of CPC, direct payment was made to MBSB to the tune of RM20m and thus leaving a balance of RM8,963,235 ('balance contract sum') which was due and owing by the defendant to PSK under the contract. Meanwhile the certificate of fitness for occupation ('CFO') was issued by the authorities. No payment was made by the defendant to PSK and the plaintiff who claimed to be entitled to the balance contract sum was also not paid. PSK was subsequently wound up. The plaintiff claimed in Suit 55 for the balance contract sum of RM8,963,235. However, during trial, the plaintiff varied his claim to a lesser sum of RM3,200,534.63. The High Court judge was of the view, inter alia, that the bailout and temporary take over agreement was a legally binding assignment as it had fulfilled all the requirements of s 4(3) Civil Law Act 1956. Hence, the plaintiff was capable of commencing the legal suit against the defendant in his own capacity as assignee as conferred upon him under the said assignment without having to join PSK as a party. Dissatisfied with the High Court's decision, the defendant appealed. The issue that arose for determination was whether there was any error or misdirection by the High Court judge when he concluded that the bailout and temporary take over agreement was an absolute assignment entitling the plaintiff to mount this suit.

Held, allowing the appeal with costs:

(1) To determine if the assignment was conditional or absolute, the fact of an absolute assignment should normally be only that it was one by which the entire interest of the assignment in the chose action such as the interest claimed by the assignee was, for the time being, transferred unconditionally, to the assignee and placed completely under the assignee's control (see para 36).

(2) To determine whether the bailout and temporary take over agreement was an absolute assignment, one must distinguish between the word 'temporary take over' and 'assign and/or assignment'. The bailout and temporary take over agreement together with correspondence between the defendant, PSK and the plaintiff did not suggest any kind of assignment and/or absolute assignment of rights and interest of PSK to the group except as guarantor to PSK's bank loan and to safeguard of the guarantor's interest vis a vis the plaintiff's agreement with PSK. Based on the bailout and temporary take over agreement, neither was the term 'assignment' stated nor was there any reference made to the term to the

same effect. There was nothing to indicate that the agreement entered between PSK and the plaintiff was one of an assignment and/or absolute assignment to confer upon the plaintiff, all rights and/or interest on the income, payment/proceeds which accrued to the plaintiff in respect of the PSK-Residenmas agreement (see paras 40–41).

(3) Clause A of the bailout and temporary take over agreement clearly stated that the parties were the investors ('group') and PSK. The investors had agreed to help out the financial crisis of PSK by infusing capital and investment in the said project. In consideration of the bail out of the crisis by the group, the parties had agreed that the profit sharing in PSK was 50–50 between PSK and the group. Based on the said 50–50 profit sharing, the guarantors were entitled the sum of RM2m out of the expected profit of RM4m. In the event the expected profit was less than RM4m, then the guarantors were only entitled to RM3m. Based on that reason, the plaintiff had reduced his claim to RM3,200,534.63 which was provided under cls 3 and 4 of the bailout and temporary take over agreement. Hence, the agreement was merely a profit-sharing scheme wherein it had set out the framework for the allocation of profit as stated in the agreement. Such profit-sharing arrangement/agreement could not be construed as an 'assignment' (see para 42).

(4) The clauses in the bailout and temporary take over agreements did not indicate an assignment of rights, but rather serve as a protective measure for the investors. The repayment requirement which was spelt out in both clauses rendered the purported assignment conditional in nature. If the intent were to effectuate an absolute assignment, the PSK's rights and interests in relation to the proceeds/payment and income from the PSK-Residenmas agreement would have been unconditionally assigned to the group of investors/plaintiff, rather than being divided between the group of investors and PSK in the manner set out in cls 3 and 5 of the bailout and temporary take over agreement. In such circumstances, it was not an absolute assignment in nature at all (see para 50).

(5) As far as bailout and temporary take over agreement was concerned, parties to the contract were the group of investors and PSK. Furthermore, the bailout and temporary take over agreement did not provide for assignment of rights and interests, including the PSK's entitlement to the income and proceed/payment in PSK-Residenmas agreement to the group of investors or the plaintiff. Be that as it may, there was nothing in the agreement which mentioned that the defendant was obligated to fulfil any of the terms and conditions specified by the plaintiff to PSK (see para 54).

(6) It was clear that the bailout and temporary take over agreement was not an absolute assignment as it fell short of meeting the requisite requirements stipulated under s 4(3) of the Civil Law Act 1956. It was,

therefore, clear that the plaintiff, being a stranger to PSK-Residenmas agreement, did not have the locus standi and cause of action to initiate this action against the defendant as the plaintiff was not privy to the said agreement. In view of the conclusion on liability, the issue of quantum was rendered academic. There was an appealable error in the High Court judge's decision that warranted appellate intervention (see paras 55–56 & 59–60).

[Bahasa Malaysia summary

Ini adalah rayuan oleh perayu ('defendan') terhadap keputusan Mahkamah Tinggi ('Tindakan 55') yang membenarkan tuntutan responden ('plaintif'). defendant adalah pemaju sebuah projek yang dikenali sebagai pembangunan bercampur di atas Lot PT805-PT806, Muara Sungai Duyung, Mukim Alai, Daerah Melaka Tengah 1 Melaka' ('projek Melaka'). Defendan telah melantik Pembinaan Suci Kesturi Sdn Bhd ('PSK') sebagai kontraktor utama bagi pembangunan fasa pertama Projek Melaka ('fasa 1') melalui surat penerimaan. Dalam melaksanakan tanggungjawabnya di bawah fasa 1, PSK menghadapi masalah kewangan dan teknikal. Bagi mengatasi kesulitan tersebut, PSK memutuskan untuk mendapatkan bantuan daripada plaintif. Sebagai balasan kepada bantuan plaintif, PSK: (a) menyerahkan hak pendapatan dan bayaran/perolehan yang PSK berhak terima di bawah kontrak kepada plaintif ('serah hak tersebut'); dan (b) memberi kuasa kepada plaintif dan penamanya dengan kuasa, jagaan dan kawalan pengurusan PSK. Pada setiap masa yang material, defendan menyedari penyerah hak tersebut yang mengakibatkan 'pengambilalihan' PSK oleh plaintif dan penamanya melalui urusan antara pihak-pihak serta surat-menyurat yang ditandatangani oleh plaintif untuk dan bagi pihak PSK dalam tempoh pembinaan fasa 1 projek Melaka. Fasa 1 telah berjaya disiapkan dan sijil penyiapan praktikal ('SPP') yang mengesahkan penyiapan fasa 1 yang sepatutnya bernilai RM28,963,235 telah dikeluarkan oleh arkitek yang dilantik untuk projek Melaka. Sekitar masa SPP, pengarah dan pemegang saham PSK terdahulu telah merampas kawalan PSK daripada plaintif yang membawa kepada pemfailan Saman Pemula No 24NCvC-856-04 tahun 2012 ('SP KLHC') terhadap PSK, pengarahnya dan pemegang saham dan defendan. Dalam SP KLHC, kedua-dua plaintif dan defendan telah bertukar afidavit, yang mana perintah persetujuan direkodkan dan SP KLHC terhadap defendan telah ditarik balik. Pembiaya defendan untuk projek Melaka adalah Malaysia Building Society Bhd ('MBSB'). Selepas pengeluaran SPP, bayaran terus dibuat kepada MBSB sehingga RM20 juta dan dengan itu meninggalkan baki RM8,963,235 ('jumlah baki kontrak') yang perlu dibayar dan terhutang oleh defendan kepada PSK di bawah kontrak. Manakala sijil kelayakan menduduki ('SKM') telah dikeluarkan oleh pihak berkuasa. Tiada bayaran dibuat oleh defendan kepada PSK dan plaintif yang mendakwa berhak mendapat jumlah baki kontrak juga tidak dibayar. PSK kemudiannya digulung. Plaintif menuntut dalam Tindakan 55 untuk jumlah baki kontrak sebanyak RM8,963,235. Bagaimanapun, semasa perbicaraan,

plaintif mengubah tuntutannya kepada jumlah yang lebih rendah iaitu RM3,200,534.63. Hakim Mahkamah Tinggi berpendapat, antara lain, bahawa perjanjian *bailout* dan pengambilalihan sementara adalah serah hak yang mengikat di sisi undang-undang kerana ia telah memenuhi semua keperluan s 4(3) Akta Undang-Undang Sivil 1956. Oleh itu, plaintif mampu untuk memulakan saman undang-undang terhadap defendan atas kapasitinya sendiri sebagai pemegang serah hak seperti yang diberikan kepadanya di bawah Serah Hak tersebut tanpa perlu menyertai PSK sebagai pihak. Tidak berpuas hati dengan keputusan Mahkamah Tinggi, defendan merayu. Isu yang timbul untuk penentuan adalah sama ada terdapat sebarang kesilapan atau salah arah oleh hakim Mahkamah Tinggi apabila beliau membuat kesimpulan bahawa perjanjian *bailout* dan pengambilalihan sementara adalah serah hak mutlak yang melayakkan plaintif untuk mengemukakan tindakan ini.

Diputuskan, membenarkan rayuan dengan kos:

(1) Untuk menentukan sama ada penyerahhakan itu bersyarat atau mutlak, hakikat penyerahhakan mutlak biasanya hanya bahawa ia adalah satu yang mana keseluruhan kepentingan penyerahan hak dalam tindakan dipilih seperti kepentingan yang dituntut oleh pemegang serah hak adalah, untuk pada masa ini, dipindahkan tanpa syarat, kepada penerima serah hak dan diletakkan sepenuhnya di bawah kawalan penerima serah hak (lihat perenggan 36).

(2) Untuk menentukan sama ada perjanjian *bailout* dan pengambilalihan sementara adalah serah hak mutlak, seseorang mesti membezakan antara perkataan 'pengambilalihan sementara' dan 'serah hak dan/atau penyerahan hak'. Perjanjian *bailout* dan pengambilalihan sementara bersama-sama surat-menyurat antara defendan, PSK dan plaintif tidak mencadangkan sebarang jenis penyerahan hak dan/atau penyerahan hak dan kepentingan mutlak PSK kepada kumpulan tersebut kecuali sebagai penjamin kepada pinjaman bank PSK dan untuk melindungi kepentingan penjamin berhubung denagn perjanjian plaintif dengan PSK. berdasarkan perjanjian *bailout* dan pengambilalihan sementara, istilah 'penyerahan hak' tidak dinyatakan dan tiada sebarang rujukan dibuat kepada istilah yang mempunyai kesan yang sama. Tiada apa-apa yang menunjukkan bahawa perjanjian yang dimeterai antara PSK dan plaintif adalah salah satu penyerahhakan dan/atau penyerahan hak mutlak untuk diberikan kepada plaintif, semua hak dan/atau faedah ke atas pendapatan, pembayaran/perolehan yang terakru kepada plaintif berkenaan perjanjian PSK-Residenmas (lihat perenggan 40–41).

(3) Klausa A perjanjian *bailout* dan pengambilalihan sementara dengan jelas menyatakan bahawa pihak yang terlibat adalah pelabur ('kumpulan') dan PSK. Para pelabur telah bersetuju untuk membantu krisis kewangan PSK dengan menyuntik modal dan pelaburan dalam projek tersebut. Sebagai

balasan jaminan keluar daripada krisis oleh kumpulan, pihak-pihak telah bersetuju bahawa perkongsian keuntungan dalam PSK adalah 50–50 antara PSK dan kumpulan tersebut. Berdasarkan perkongsian keuntungan 50–50 tersebut, penjamin berhak menerima jumlah RM2 juta daripada keuntungan jangkaan RM4 juta. Sekiranya jangkaan keuntungan kurang daripada RM4 juta, maka penjamin hanya layak mendapat RM3 juta. Atas sebab itu, plaintif telah mengurangkan tuntutannya kepada RM3,200,534.63 yang diperuntukkan di bawah klausa 3 dan 4 perjanjian *bailout* dan pengambilalihan sementara. Oleh itu, perjanjian itu hanyalah satu skim perkongsian untung di mana ia telah menetapkan rangka kerja peruntukan keuntungan seperti yang dinyatakan dalam perjanjian. Pengaturan/perjanjian pembahagian keuntungan tersebut tidak boleh ditafsirkan sebagai 'penyerahan hak' (lihat perenggan 42).

(4) Klausa dalam perjanjian *bailout* dan pengambilalihan sementara tidak menunjukkan penyerahan hak, sebaliknya berfungsi sebagai langkah perlindungan bagi pelabur. Keperluan pembayaran balik yang dinyatakan dalam kedua-dua klausa menjadikan penyerahan hak yang dikatakan bersifat bersyarat. Sekiranya niat untuk melaksanakan penyerahhakan mutlak, hak dan kepentingan PSK berhubung dengan hasil/pembayaran dan pendapatan daripada perjanjian PSK-Residenmas akan diserahkan tanpa syarat kepada kumpulan pelabur/plaintif, dan bukannya dibahagikan antara kumpulan pelabur dan PSK mengikut cara yang dinyatakan dalam klausa 3 dan 5 perjanjian *bailout* dan pengambilalihan sementara. Dalam keadaan sedemikian, ia bukan penyerahan hak mutlak sama sekali (lihat perenggan 50).

(5) Setakat mana perjanjian *bailout* dan pengambilalihan sementara, pihak yang terlibat dalam kontrak itu adalah kumpulan pelabur dan PSK. Tambahan pula, perjanjian *bailout* dan pengambilalihan sementara tidak memperuntukkan penyerahan hak dan kepentingan, termasuk kelayakan PSK kepada pendapatan dan hasil/pembayaran dalam perjanjian PSK-Residenmas kepada kumpulan pelabur atau plaintif. Walau apa pun, tiada apa-apa dalam perjanjian yang menyebut bahawa defendan bertanggungjawab untuk memenuhi mana-mana terma dan syarat yang dinyatakan oleh plaintif kepada PSK (lihat perenggan 54).

(6) Ia adalah jelas bahawa perjanjian *bailout* dan pengambilalihan sementara bukanlah penyerahan hak mutlak kerana ia tidak memenuhi keperluan yang ditetapkan di bawah s 4(3) Akta Undang-Undang Sivil 1956. Oleh itu, ia adalah jelas bahawa plaintif, yang tidak dikenali dalam perjanjian PSK-Residenmas, tidak mempunyai locus standi dan kausa tindakan untuk memulakan tindakan ini terhadap defendan kerana plaintif bukanlah privi (pihak) kepada perjanjian tersebut. Berdasarkan kesimpulan mengenai liabiliti, isu kuantum telah menjadi akademik.

Terdapat kekhilfan boleh rayu dalam keputusan hakim Mahkamah Tinggi yang memerlukan campur tangan rayuan (lihat perenggan 55–56 & 59–60).]

Cases referred to

Hipparion (M) Sdn Bhd v Chung Khiaw Bank Ltd [1989] 2 MLJ 149; [1989] 2 CLJ 101; [1989] 1 CLJ Rep 41, SC (refd)
Khaw Poh Chhuan v Ng Gaik Peng & Ors [1996] 1 MLJ 761, FC (refd)
Mercantile Bank of London, Ltd v Evans [1899] 2 QB 613, CA (refd)
Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd [1984] 2 MLJ 268; [1985] 1 CLJ 56; [1985] CLJ Rep 231, FC (refd)
Philioallied Bank (M) Bhd v Bupinder Singh a/l Avatar Singh & Anor [2002] 2 MLJ 513; [2002] 2 CLJ 621, FC (refd)
Sia Siew Hong & Ors V Lim Gim Chian & Anor [1995] 3 MLJ 141; [1996] 3 CLJ 26, CA (folld)
Suwiri Sdn Bhd v Government of the State of Sabah [2008] 1 MLJ 743, FC (refd)
UMW Industries Sdn Bhd v Ah Fook [1996] 1 MLJ 365; [1996] 1 CLJ 379, FC (folld)

Legislation referred to

Civil Law Act 1956 s 4(3)

Appeal from: Civil Suit No 22NCVC-55–10 of 2016 (High Court, Melaka)

Amardas Jethanand (with Yok Jiang Lin) (KP Ng & Amardas) for the appellant.
Angeline Chin Yoke Fong (Amin Karlos) for the respondent.

Mariana Yahya JCA:

INTRODUCTION

[1] This is an appeal by the appellant against the decision of the High Court dated 3 October 2022 in allowing the respondent's claim per Melaka High Court Civil Suit No 22NCVC-55–10 of 2016 ('Suit 55') as follows;

(a) the appellant to pay the respondent a sum of RM3,200,534.63;

(b) the appellant to pay the respondent interest of 5%pa on the judgment sum of RM3,200,534.63 from 31 October 2010 until full and final realisation; and

(c) costs of RM30,000 subject to allocator,

for ease of reference, the parties in this appeal shall be referred to as they were in the High Court, the respondent as 'the plaintiff' and the appellant as 'the defendant'.

BACKGROUND FACTS

[2] The facts of the case as narrated in the learned High Court judge's grounds of judgment are as follows.

[3] The defendant is the developer of a project known as 'Pembangunan Bercampur di atas Lot PT805-PT806, Muara Sungai Duyung, Mukim Alai, Daerah Melaka Tengah 1 Melaka' ('Melaka project').

[4] The defendant appointed Pembinaan Suci Kesturi Sdn Bhd ('PSK') as the main contractor for the development of the first phase of the Melaka project ('Phase 1') via a 'Letter of Acceptance' dated 29 December 2006 which was duly accepted by PSK on 10 January 2007.

[5] In the course of executing its obligations under Phase 1, PSK encountered financial and technical difficulties due to some disputes with its joint venture partner, Intraline Resources Sdn Bhd In order to overcome these difficulties, PSK decided to obtain assistance from the plaintiff, YM Raja Halinuddin bin Raja Halid ('YM').

[6] In consideration of YM's assistance, PSK:

(a) assigned the income and payments/proceeds that PSK was entitled to receive under the contract to YM which is evidenced by, inter alia, YM's solicitors' Messrs Wan M Amin & Associates letter dated 16 April 2009 ('the said assignment'); and

(b) empowered YM and his nominees with authority, custody and management control of PSK.

[7] At all material times, the defendant was aware of the said assignment resulting in the 'take over' of PSK by the plaintiff and his nominees through the dealings between the parties as well as correspondence signed by the plaintiff for and on behalf of PSK in the course of constructing Phase 1 of the Melaka project.

[8] Phase 1 was successfully completed and a certificate of practical completion dated 30 October 2010 ('CPC') certifying the due completion of Phase 1 to the value of RM28,963 235 was issued by Arkitek Pembangunan, the appointed architect for the Melaka project.

[9] Around the time of the CPC, the previous directors and shareholders of PSK wrested control of PSK from the plaintiff which led to the filing of Kuala

Lumpur High Court Originating Summons No 24NCvC-856–04 of 2012 ('KLHC OS') against PSK, its directors and shareholders and the defendant.

[10] In the KLHC OS, both the plaintiff and the defendant had exchanged affidavits, after which a consent order dated 16 August 2012 was recorded and the KLHC OS against the defendant was withdrawn.

[11] The defendant's financier for the Melaka project is Malaysia Building Society Bhd ('MBSB'). After the issuance of CPC, direct payment was made to MBSB to the tune of RM20m and thus leaving a balance of RM8,963,235 ('balance contract sum') which was due and owing by the defendant to PSK under the contract. Meanwhile the certificate of fitness for occupation dated 19 September 2011 ('CFO') was issued by the authorities.

[12] No payment was made by the defendant to PSK. The plaintiff who claimed to be entitled to the balance contract sum was also not paid. PSK was wound up on 14 May 2013.

[13] The plaintiff claims in Suit 55 was for the following reliefs:

(a) the balance contract sum of RM8,963,235;

(b) alternatively, such sum as the court deems fit;

(c) general damages to be assessed;

(d) interest;

(e) costs; and

(f) any other reliefs that the court deems suitable.

[14] However during trial, the plaintiff through his witness statement varied his claim to a lesser sum of RM3,200,534.63.

DECISION OF THE HIGH COURT

[15] On 3 October 2022, the learned High Court judge allowed the plaintiff's claim as follows:

> ADALAH PADA HARI DIHAKIMKAN bahawa defendan hendaklah membayar kepada plaintif:
>
> (a) wang berjumlah RM3,300,534.63;
>
> (b) faedah pada kadar 5% setahun ke atas RM3,300,534.63 tersebut dikira daripada 31 October 2010 sehingga tarikh penyelesaian penuh; dan
>
> (c) kos berjumlah RM30,000 tertakluk kepada fi alokatur.

FINDINGS OF THE HIGH COURT

[16] In allowing the plaintiff's claim, the learned High Court judge arrived at the findings as summarised below:

(a) the learned High Court judge was of the view that the clauses in the bailout and temporary take over agreement dated 16 April 2009 in reference to cll 3, 7, 8, 9, 10, 19 and 20 are absolute in nature and had concluded that the document in question (ie letter dated 16 April 2009) had created an absolute assignment of PSK's right and liabilities in Phase 1 of the Melaka project;

(b) further, the learned High Court judge also made a finding that although the word assignment had not been stated, that ipso facto does not negate the creation of an absolute assignment. The learned High Court judge concluded that the existence of an absolute assignment as per the letter dated 16 April 2009, cannot be denied;

(c) the defendant was given several written notices of the purported absolute assignment especially the so-called letter dated 11 May 2009 by the directors of PSK which had informed the defendant about the assignment of PSK rights, interests and/or benefit in respect of the PSK — Residenmas agreement ('the said agreement'); and

(d) based on the above said reasons, the learned High Court judge concluded that the bailout and temporary take over agreement dated 16 April 2009 is a legally binding assignment as it has fulfilled all the requirements of s 4(3) Civil Law Act 1956. Hence, the plaintiff is capable of commencing the legal suit against the defendant in his own capacity as assignee as conferred upon him under the said assignment without having to join PSK as a party.

[17] Dissatisfied with the High Court's decision, the defendant appealed to this court.

THE DEFENDANT'S SUBMISSION

[18] The PSK-Residenmas agreement involves only PSK and the appellant. At all material times, the plaintiff was not a party, nor was he privy to the said agreement. As such, being a stranger to PSK-Residenmas agreement, the plaintiff cannot enforce the contract and does not have locus standi and/or any cause of action against the defendant.

[19] In order for the plaintiff to bring this instant suit alone as assignee, the plaintiff must first establish that there is an absolute assignment given by PSK to him by virtue of s 4(3) of the Civil Law Act 1956, passing him the entire

PSK's rights or interest over the income, payment/proceeds in relation to PSK-Residenmas agreement.

[20] It is the defendant's submission that the bailout and temporary take over agreement is not an assignment, much less an absolute assignment. In the bailout and temporary take over agreement dated 16 April 2009, the term 'assignment' is nowhere stated. The said agreement also made no reference to any term which could have the same effect.

[21] The defendant further submitted that bailout and temporary take over agreement, particularly cll 3 and 5, reveal that the agreement is merely a profit-sharing scheme which sets out a framework for the allocation of profit obtained by PSK from the Melaka project between the group of investors and PSK in consideration of the investors infusing capital and investment to PSK.

[22] Counsel emphasised that the transfer and re-transfer of PSK's shares as stipulated under cll 7, 19 and 20 of the bailout and temporary take over agreement are no more than a form of security given to the group of investors to safeguard their interests as investors in consideration of their capital infusion and investment. The clauses do not indicate an assignment of rights but rather serve as a protective measure for the investors.

[23] It is the defendant's further submission that there are no contemporaneous documents indicating the purported assignment, nor is there any express notice thereof. The bailout and temporary take over agreement is not an absolute assignment as it falls short of meeting the requisite requirements stipulated under s 4(3) of the Civil Law Act 1956. In short, the plaintiff has no locus standi to file Suit 55 herein against the defendant by virtue of the purported absolute assignment.

THE PLAINTIFF'S SUBMISSION

[24] As regards the absence of the word 'assignment' in any part of Messrs Wan M Amin & Associates' letter dated 16 April 2009, the plaintiff contended that the courts in construing contracts have never been bound by any specific label that may be used by the parties in any contract whether drafted by the parties themselves or by any legally qualified person.

[25] Applying the principle in *Sia Siew Hong & Ors V Lim Gim Chian & Anor* [1995] 3 MLJ 141; [1996] 3 CLJ 26, the plaintiff submitted that in the construction of contracts, the court is not bound by the labels that parties choose to affix onto the particular document. The duty of the court is clear, that is to construe the document as a whole and to determine from its language and any other admissible evidence its true nature and purport.

[26] The plaintiff further submitted that the intention of the parties in executing the Assignment was to solve PSK's financial woes via YM's Group provision of financial support by standing as guarantors and infusion of capital as well as other forms of investments. In return, PSK surrendered its' chose in action of RM1.6m, first RM2m of the estimated profits and further sum of RM1.6m plus executed Form 32A to transfer all PSK shares to YM's Group or YM's Group's nominee(s).

[27] Yet further, an executive committee comprising only YM's Group effectively taking over PSK and surrendered to YM's Group was set up who effectively took over PSK including the management of the Melaka project. And YM's Group was to solely regulate PSK's cash flow and bank accounts. As the estimated profit is RM4m, there was no real sharing of the expected income or profits from the Melaka project. Express provision for 50:50 division of profits in cl 3(b) of Part 'C' of the assignment would only make sense if read in tandem with cl 4 of Part 'C', namely 50:50 division would apply where profits exceeded RM4m (which was not expected). The plaintiff contends that the LHCJ High Court judge was right to conclude that the transaction between PSK and YM was an absolute assignment on evaluation of the documentary evidence.

[28] As regards the assignment by way of security, the plaintiff argued that if it is true that the said assignment was merely to secure the cash pumped into or loaned to PSK, then there would be no need to set up an executive committee, take over management of the Melaka project, transfer the shareholding of PSK away from the original shareholders of PSK and stand as guarantor(s) in favour of PSK.

[29] Going to the issue of notice, it is impossible to ignore the probability that in the course of YM's management of the Melaka project from the assignment (dated 16 April 2009) by the second quarter of 2009, that the defendant already knew of the takeover and the assignment. In particular, PSK's letter dated 11 May 2009 signed by the previous directors of PSK was already made known to the defendant when the affidavit in the KLHC OS was received.

[30] The plaintiff further submitted that the bailout and temporary take over agreement dated 16 April 2009 is an assignment/absolute assignment and the defendant is bound by the said assignment. The plaintiff also submitted that on balance of probability, he has proven his claims against the defendant.

A OUR DECISION

[31] The core issue that is to be considered and determined by this court is whether there was any error or misdirection by the learned High Court judge when he concluded that the bailout and temporary take over agreement dated 16 April 2009 was an absolute assignment entitling the plaintiff to mount this suit. If the plaintiff fails to establish an absolute assignment, then the issue of quantum becomes academic.

[32] It is pivotal to note that the basis for the learned High Court judge in deciding that bailout and temporary take over agreement dated 16 April 2009 is an assignment and/or absolute assignment are cll 3,7, 8, 9, 10, 19 and 20 of the said assignment ('the said clauses') and s 4(3) of the Civil Law Act 1956. The learned judge also referred to several letters from PSK to the defendant which the plaintiff had relied upon in support of their claim.

[33] The salient and relevant terms of the bailout and temporary take over agreement are as follows:

(a) cl A sets out the parties to the bailout and temporary take over agreement:

A. Parties

i) The Investors comprising a total of eight (8) individual Investors ('the Group'), three (3) of whom shall stand as guarantors for a loan by PSK ('the Guarantors') shall all be represented by Y.M. Raja Halinuddin bin Raja Halid ('RH'). An authorisation letter shall be issued by the Group to RH and shall be kept by Messrs Wan M Amin & Associates in escrow unless specifically requested in writing by the PSK.

ii) Pembinaan Suci Kesturi Sdn Bhd ('PSK')

(b) Part C — cll 3, 4, and 5 of Part C sets out the distribution arrangement of the profit between the group of investors and the PSK:

Clause 3

3. In consideration of the bailout as detailed in Part C Item (i) above, the Group shall be entitled to the following:

(a) Repayment of the RM1.6m capital infusion which shall be taken as part of total costs for the Melaka project; and

(b) The Estimated Profits ('the Profits') from the Project is expected to be RM4m shall be divided equally between PSK and the Group (on a 50:50 ratio basis). The Group shall be entitled to the first RM2m of the Profits from the payment made by MBSB which shall be distributed as follows:

(i) RM1.6m to the Group divided in proportion with their individual investments,

(ii) The balance of RM400,000 shall be distributed equally amongst the Guarantors.

(c) Thereafter a further RM1.6m shall be paid to the Group from the Profits derived from Melaka project.

(d) In the event that the final Profits is less than the estimated RM4m, the Group shall be entitled to the first RM2m of the Profits and PSK shall only be entitled to any sum above the initial RM2m.

Clause 4

Therefore, the total repayment (capital investment + returns + Guarantors' fees) is RM3.2 million + RM400,000/-)

(iii) Additional Profits from the Melaka project in excess of the RM4m.

Clause 5

5. After the income from the Melaka project has been applied in accordance with Part C item (ii) above, and in the event PSK is able to achieve Profits in excess RM4m the excess in Profits (whatever the sum) shall be applied as follows:

a) The Guarantors: 50 %

b) PSK: 50%

Profit sharing ratio: 50:50

(c) cll 7, 19, and 20 provide for the transfer of shares by PSK's shareholders to the group of investors and the re-transfer of PSK's share to the original shareholders

Clause 7

7. In consideration of the Bailout and Investments by the Group as stated in Part C Item (i) above and in addition to items (ii) and (iii) above PSK's shareholders shall execute Form 32A to transfer their shares to the Group or whomsoever the Group should assign to hold the shares on their behalf.

Clause 19

19. Once the Group have obtained full payment of all its advances and returns from the Melaka project and when the Group is, in its

absolute discretion, satisfied that their interests in the Melaka project has been fully protected they will cause the re-transfer of PSK's shares back to the original shareholders/transferors once.

Clause 20

20. The Group, through their representative(s), shall have complete operational control of PSK until the re-transfer of shares have been affected and their representative(s) in PSK have vacated their respective positions therein.

THE CLAIM IN ABSOLUTE ASSIGNMENT

[34] It is trite that in order to determine whether there is an absolute assignment, the court must confine itself to the four corners of the instrument.

In *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* [1984] 2 MLJ 268; [1985] 1 CLJ 56; [1985] CLJ Rep 231, Seah FCJ held as follows:

> It is plain that in every case of this kind, all the terms of the instrument must be considered; and whatever may be the phraseology adopted in some particular part of it, if, on consideration of the whole instrument, it is clear that the intention was to give a charge only, then the action must be in the name of the assignor. While, on the other hand, if it is clear from the instrument as a whole that the intention was to pass all the rights of the assignor in the debt or chose in action to the assignee, then the case will come within s 25 and the action must be brought in the name of the assignee (*Mathew LJ Hughes v Pump House Hotel Co Ltd* [1902] 2 KB 190). Having stated the preliminary and before we examine the terms of the document of assignment dated February 18 1978 we would dispose of a short submission of learned counsel for the appellant. It was contended that since the assignment was entered into following the execution of a loan agreement between the appellant and the Public Bank, the said assignment should not be read in isolation but should be read in conjunction with the said loan agreement. With respect, we do not agree. In our judgment and it seems clear from the authorities above-mentioned, *whether or not an assignment is an absolute one (not purporting to be by way of charge only) within the meaning of s 4(3) of the Civil Law Act 1956 is to be gathered only from the four corners of the instrument itself*. (Emphasis added.)

Ultimately, whether or not an assignment is absolute for the purposes of the statutory regime is an issue of construction (see *Mercantile Bank of London, Ltd v Evans* [1899] 2 QB 613).

[35] The decision in *Nouvau Mont Dor (M) Sdn Bhd* was followed by the decision of the Federal Court in *Philioallied Bank (M) Bhd v Bupinder Singh a/l Avatar Singh & Anor* [2002] 2 MLJ 513; [2002] 2 CLJ 621 where one of the issues raised therein was whether the loan agreement cum assignment was an equitable mortgage or an equitable charge. The loan agreement cum assignment was entered into on 3 January 1996 under which the respondents' rights, title, and interest under the sale and purchase agreement were absolutely assigned to the appellant. It was held that since the assignment under the 'loan agreement cum assignment' was absolute and not one 'purporting to be by way of charge only' within the meaning of s 4(3) of the Civil Law Act 1956, the borrowers, as assignors, were not even competent to maintain the originating summon.

[36] Similarly, in *Hipparion (M) Sdn Bhd v Chung Khiaw Bank Ltd* [1989] 2 MLJ 149; [1989] 2 CLJ 101; [1989] 1 CLJ Rep 41, the Supreme Court held that the deed clearly purports and is intended in point of form to be an absolute assignment because of the use of the words 'absolutely'. The use of the words 'absolutely assigns' demonstrates that the instrument was intended by the parties to be an absolute assignment and not by way of charge only. The intention of the parties clearly was that the deed should be absolute in the sense

that the assignee should have all the rights, title, and interest of the assignor in the sale and purchase agreement.

[37] To determine if the assignment is conditional or absolute, the fact of an absolute assignment should normally be only that it is one by which the entire interest of the assignment in the chose action such as the interest claimed by the assignee is, for the time being, transferred unconditionally, to the assignee and placed completely under the assignee's control (see *Khaw Poh Chhuan v Ng Gaik Peng & Ors* [1996] 1 MLJ 761 (FC)).

[38] Further, s 4(3) of the Civil Law Act 1956 also provide conditions for effecting absolute legal assignments. Section 4(3) of the CLA read as follows:

> Any absolute assignment, by writing, under the hand of the assignor, not purporting to be by way of charge only of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, shall be and be deemed to have been, effectual in law, subject to all equities which would have been entitled to priority over the rights of the assignee under the law as it existed in the State before the date of the coming into force of this Act, to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.

[39] The Federal Court in *UMW Industries Sdn Bhd v Ah Fook* [1996] 1 MLJ 365; [1996] 1 CLJ 379 (FC) set out the three conditions for effecting an absolute assignment and they are as follows:

(a) that the assignment must be in writing under the hand of the assignor;

(b) that the assignment must be absolute and not by way of charge only; and

(c) that express notice in writing must have been given to the person liable to the assignor under the assigned chose in action.

[40] If the assignment fulfills all the above three conditions, it would transfer absolutely the chose in action and the right to sue upon it in the assignee's own name. As to the assignment in writing, no particular form is necessary but it must be absolute ie one that purports to pass the entire interest of the assignor in the chose in action.

[41] Guided by the above authorities, the question before us is whether the bailout and temporary take over agreement dated 16 April 2009 is an absolute assignment?

Based on evidence and circumstances of the case, in our considered view, one has to distinguish between the word 'temporary take over' and 'assign and/or

assignment'. The bailout and temporary take over agreement together with correspondence between the defendant, PSK and the plaintiff do not suggest any kind of assignment and/or absolute assignment of rights and interest of PSK to the Group except as guarantor to PSK's bank loan and to safeguard of the guarantor's interest vis a vis the plaintiff's agreement with PSK.

[42] Reading the four corners of the bailout and temporary take over agreement, we note that neither is the term 'assignment' stated nor is there any reference made to the term to the same effect. There is nothing to indicate that the agreement entered between PSK and the plaintiff was one of an assignment and/or absolute assignment to confer upon the plaintiff, all rights and/or interest on the income, payment/proceeds which accrued to the plaintiff in respect of the PSK-Residenmas agreement.

[43] Coming back to bailout and temporary take over agreement, in our view cl A of the said agreement clearly states that the parties are the investors ('Group') and PSK. The investors have agreed to help out the financial crisis of PSK by infusing capital and investment in the said project. In consideration of the bail out of the crisis by the Group, the parties have agreed that the profit sharing in PSK is 50–50 between PSK and the Group. Based on the said 50–50 profit sharing, the guarantors are entitled the sum of RM2m out of the expected profit of RM4m. In the event the expected profit is less than RM4m, then the guarantors are only entitled to RM3m only. Based on that reason, the plaintiff has reduced his claim to RM3,200,534.63 only which is provided under cll 3 and 4 of the bailout and temporary take over agreement. It is our considered view that the agreement is merely a profit-sharing scheme wherein it sets out the framework for the allocation of profit as stated in the agreement. Such profit-sharing arrangement/agreement cannot be construed as an 'assignment'.

[44] We have looked at all the correspondence between plaintiff and the defendant. We find that the plaintiff had never mentioned that he was the assignee in reference to the so-called existing assignment. In fact, it is our respectful view that the plaintiff was only the guarantor to PSK's loan and remained as guarantor.

[45] In support of the plaintiff's status as guarantor to PSK, several letters dated 28 August 2009, 15 October 2010, and 22 November 2020 clearly demonstrate that the plaintiff signed these letters for and on behalf of PSK as guarantor cum executive committee of PSK. We observed that none of those letters refer to the plaintiff as assignee. We agree with the learned counsel for the defendant's submission that if there was indeed an assignment by PSK to the plaintiff, such assignment would have logically been referenced in the letters

and the plaintiff would have signed them in the capacity of an assignee rather than as a guarantor (executive committee PSK).

[46] The plaintiff alleged that PSK's letter dated 11 May 2009 is sufficient enough to show that notice regarding the purported assignment from PSK to the plaintiff had been given to the defendant which the defendant had knowledge of the same. We refer to paras 1 and 2 therein which read as follows:

> To whom it may concern,
>
> We hereby inform with effect from the date of this letter, Sungai
>
> Duyong Project (Phase 1) in Melaka will be under the responsibility of our new stakeholder, SS Industries Sdn Bhd ('SSI'). The project site in Sungai Duyong, Melaka would however continue to managed by our Project Manager, Mr Tee Min Hoe (IC No: 710112–01–5001) and reported to SSI representative namely:
>
> 1) Raja Halinuddin B.Raja Halid
> 2) Wan Amal Binti Wan Mokhtar
> 3) Wan Mohammad Nasri Bin Wan Mokhtar
> 4) Zahrin Bin Mahat

[47] From the plain reading of the above said paragraphs, we agree with the defendant's counsel submission that the above paragraphs merely state that SSI would assume the role of the new stakeholder of Melaka project (Phase 1). In so far, the project management is concerned, it is pertinent to note that it would still continue under the supervision of PSK's Project Manager, Mr Tee Min Hoe, who should provide updates to SSI's representatives, including the plaintiff on the project.

[48] It is apparent that there is nothing therein to suggest that PSK had assigned all its rights, interests and/or or benefit in respect of the PSK-Residenmas agreement. In short, there are no documents nor express notices of assignment in writing to the defendant. The content of the letter dated 11 May 2009 do not reflect the finding of the learned High Court judge that there were notices of assignment in writing to the defendant.

[49] Clause 18 of the bailout and temporary take over agreement also do not suggest that PSK's account is under full control of the plaintiff. In fact, the signatory to the PSK's account is still the PSK's representative. Clause 18 of the said agreement provides for the signatory to the PSK's account:

> 18. The Group representative(s) shall be a named signatory to
>
> PSK's Account and shall be one of the two (2) signatories of PSK's cheques. The other signatory shall remain a representative of PSK.

[50] As regards to cll 19 and 20 of the bailout & temporary take over agreement, we agree with the learned counsel for the defendant's submission that both clauses refer to PSK's shares and that PSK's operational control shall be transferred to the group of investors until and unless the full repayment of the advances and returns from the Melaka project. Such transfer and re-transfer of share are no more than a form of security given to the group of investors to safeguard their interests as investors in consideration of their capital infusion and investment.

[51] The clauses do not indicate an assignment of rights, but rather serve as a protective measure for the investors. In our view, the repayment requirement which was spelt out in both clauses renders the purported assignment conditional in nature. If the intent were to effectuate an absolute assignment, the PSK's rights and interests in relation to the proceeds/payment and income from the PSK-Residenmas agreement would have been unconditionally assigned to the group of investors/plaintiff, rather than being divided between the group of investors and PSK in the manner set out in cll 3 and 5 of the bailout and temporary take over agreement. In such circumstances, it is our respectful view that, it is not an absolute assignment in nature at all as decided by the learned High Court judge.

[52] In the light of the foregoing cll 3, 4, 5, 7, 19, and 20 of the bailout and temporary take over agreement, it would be a strange interpretation to state that the alleged assignment created was an absolute assignment when the agreement between the group investors to PSK was purely for the purpose of security of the capital or investment injected by the group of investors and not otherwise.

PRIVITY OF CONTRACT

[53] The doctrine of privity of contract is that as a general rule, a contract cannot confer rights or impose obligations on strangers to it, ie persons who are not parties to it (see *Suwiri Sdn Bhd v Government of the State of Sabah* [2008] 1 MLJ 743). Further, it is trite law that a non-party to a contract cannot enforce the contract. Only parties to contracts can sue to enforce their rights or claim damages as such.

[54] The defendant in its letter of acceptance dated 29 December 2006 accepted the tender sum submitted by PSK for the sum of RM28,962,384. The defendant shall provide the financial guarantee from MBSB for the contract sum agreed by both parties. The amount, terms and conditions of drawdown shall be based on the terms specified in the financial agreement. The evidence does not show that the defendant was a party to the bailout & temporary take over agreement.

[55] As far as bailout and temporary take over agreement dated 16 April 2009 is concerned, it is our respectful view that parties to the contract are the group of investors and PSK. Furthermore, the bailout and temporary take over agreement does not provide for assignment of rights and interests, including the PSK's entitlement to the income and proceed/payment in PSK-Residenmas agreement to the group of investors or the plaintiff. Be that as it may, there is nothing in the agreement which mentions that the defendant is obligated to fulfil any of the terms and conditions specified by the plaintiff to PSK.

[56] It is clear that the bailout and temporary take over agreement is not an absolute assignment as it falls short of meeting the requisite requirements stipulated under s 4(3) of the Civil Law Act 1956. In our view the plaintiff has the locus standi to bring the suit herein against the defendant by virtue of the purported absolute assignment.

[57] It is therefore clear that the plaintiff, being a stranger to PSK-Residenmas agreement, does not have the locus standi and cause of action to initiate this action against the defendant as the plaintiff is not privy to the said agreement.

CONCLUSION

[58] Upon perusal of all evidence before the trial judge and upon reading the learned High Court judge's grounds of judgment, we are of the considered view that the learned High Court judge has erred in his interpretation of the clauses within the four corners of the bailout and temporary take over agreement. The learned High Court judge also has misdirected himself in fact and law in failing to appreciate that the bailout and temporary take over agreement dated 16 April 2009 is a profit-sharing scheme rather than an assignment and/or absolute assignment.

[59] We are not persuaded by the learned counsel for the respondent's submission that the bailout and temporary take over agreement dated 16 April 2009 is an assignment and/or absolute assignment.

[60] Based on the abovesaid reasons, we are impelled to the conclusion that the bailout and temporary take over agreement dated 16 April 2009 is *not* an assignment and/or absolute assignment. Therefore, the plaintiff had no cause of action and lacked the requisite locus standi to commence this action. In view of our conclusion on liability, the issue of quantum is rendered academic.

[61] In conclusion, we unanimously find that there is clearly an appealable error in the learned High Court judge's decision that warranted appellate intervention. As such we made the following orders:

(a) the appeal is allowed;

(b) the decision of the High Court dated 3 October 2022 is set aside;

(c) the plaintiff's claim (per Suit 55) is dismissed; and

(d) the plaintiff (respondent) is to pay to the defendant (appellant) the sum RM50,000 (subject to allocator) as costs here and the below.

Appeal allowed.

Reported by K Selvaraju